Supreme Court, U.S.
FILED
SEP 22 2008
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

Nos. 08-219, 08-229

NISOURCE INC, ET AL.,

Petitioners,

v.

ESTATE OF GARRISON G. TAWNEY BY LELA ANN GOFF, EXECUTRIX, ET AL.,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA AND CIRCUIT COURT OF ROANE COUNTY, WEST VIRGINIA, RESPECTIVELY

Nos. 08-218, 08-217

MASSEY ENERGY COMPANY AND CENTRAL WEST VIRGINIA ENERGY COMPANY,

Petitioners,

v.

WHEELING PITTSBURGH STEEL CORPORATION AND MOUNTAIN STATE CARBON,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA AND CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA, RESPECTIVELY

AMICI CURIAE BRIEF OF AMERICAN TORT REFORM ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, WEST VIRGINIA CHAMBER OF COMMERCE, AND AMERICAN GAS ASSOCIATION IN SUPPORT OF PETITIONERS

Counsel for Amici Curiae Listed on Inside Cover

Victor E. Schwartz
Mark A. Behrens *(Counsel of Record)*
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
600 14th Street, N.W., Suite 800
Washington, D.C. 20005
(202) 783-8400

Counsel for Amici Curiae

H. Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Ave, N.W., Suite 400
Washington, D.C. 20036
(202) 682-1163

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Brenda Nichols Harper
WEST VIRGINIA CHAMBER OF COMMERCE
1624 Kanawha Boulevard East
Charleston, WV 25311
(304) 342-1115

Kevin B. Belford
AMERICAN GAS ASSOCIATION
400 N. Capitol St., NW, Suite 450
Washington, DC 20001
(202) 824-7070

Of Counsel

September 22, 2008

QUESTIONS PRESENTED

1. Whether the trial courts below erred when they held that the massive punitive damages awards in these actions – *totaling over a quarter of a billion dollars* – involving economic harms and substantial compensatory damages conformed with due process.

2. Whether the Due Process Clause of the Fourteenth Amendment requires States to provide defendants with a right to appellate review of punitive damages awards.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE BACKGROUND IN WHICH THESE PETITIONS SHOULD BE CONSIDERED. 4

II. THIS COURT SHOULD GRANT CERTIORARI TO GIVE ADDITIONAL GUIDANCE ON THE *GORE* GUIDEPOSTS. 8

1. "Reprehensibility" in Contract Disputes 10

2. "Ratio" – Courts Should Be Reminded to Weigh Reasonableness and Proportionality. 12

3. Courts Need to be Reminded That They Must Consider Civil or Criminal Penalties For Comparable Conduct. 14

III. THIS COURT SHOULD GRANT CERTIORARI TO REQUIRE APPELLATE REVIEW OF PUNITIVE DAMAGES AWARDS. 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Addington v. Texas, 441 U.S. 418 (1979) 7

BMW of North Am., Inc. v. Gore,
517 U.S. 559 (1996)..... *passim*

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 7

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2002) ..... *passim*

Exxon Shipping Co. v. Baker,
128 S. Ct. 2605 (2008)..... *passim*

Gillham v. Admiral Corp., 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976)..... 5

Honda Motor Co., Ltd. v. Oberg,
512 U.S. 415 (1994)..... 7

In re Tobacco Litig., 624 S.E.2d 738 (W. Va. 2005)..... 19

International Bhd. Of Elec. Workers v. Foust,
442 U.S. 42 (1979)..... 7

Jones v. Barnes, 463 U.S. 745 (1983) 18

Moore v. Jewel Tea Co., 253 N.E.2d 636 (Ill. App. 1969), *aff'd*, 263 N.E.2d 103 (Ill. 1970)..... 5

Pacific Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) ..... *passim*

Phillip Morris USA v. Williams,
127 S. Ct. 1057 (2007) ..... *passim*

Safeco Inc. Co. of Am. v. Burr,
127 S. Ct. 2201 (2007) 11

Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 686 P.2d 1158
(Cal. 1984) 6

Sheets v. Castle, 559 S.E.2d 616
(Va. 2002) 18

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) ..... *passim*

Toole v. Richardson Merrell, Inc.,
251 Cal. App. 2d 689 (1967). 5

TXO Prod. Corp. v. Alliance Res. Corp.,
509 U.S. 443 (1993) ..... *passim*

STATUTES

VA. CODE § 8.01-38.1 18

OTHER AUTHORITIES

American Tort Reform Foundation,
Judicial Hellholes (2007), *available at*
http://www.atra.org/reports/hellholes/report.pdf 18

Amicus Curiae Br. of Joe Manchin, III, Governor of the State of West Virginia, *E.I. du Pont de Nemours & Co. v. Perrine*, No. 080721 (filed W.Va. June 24, 2008)..... 19

Brief of General Dynamics Corp. as *Amicus Curiae* in Support of Petitioner, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, No. 99-2035, *available at* 2000 WL 1793074. 14-15

Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze From the BMW/State Farm Guideposts*, 37 U. MICH. J.L. REFORM 441 (2004)..... 15

Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049 (2004) 17

Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967) 7

Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002) 10

E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Efficiently*, 40 ALA. L. REV. 1053 (1989)..... 5

D. Dorsey Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. REV. 1 (1982)..... 4

John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSN'L L. 391 (2004) 6-7

John Calvin Jeffries, Jr., *A Comment on The Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986) 5

Mark A. Klugheit, *"Where the Rubber Meets the Road": Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation*, 52 SYRACUSE L. REV. 803 (2002) 15

Erik K. Moller et al., *Punitive Damages in Financial Injury Verdicts*, 28 J. LEGAL STUD. 283 (1999) 10

A. Mitchell Polinsky, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998) 12

George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123 (1982) 5

Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15 (1998) 10

James B. Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on The Citadel*, 14 ST. MARY'S L.J. 351 (1983) 4

James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984) 4

Victor E. Schwartz et al., *Reining In Punitive Damages "Run Wild": Proposals for Reform By Courts And Legislatures*, 65 BROOK. L. REV. 1003 (2000) 4

Victor E. Schwartz et al., *Selective Due Process: The United States Supreme Court Has Said That Punitive Damages Awards Must Be Reviewed for Excessiveness, But Many Courts Are Failing to Follow The Letter And Spirit of The Law*, 82 OR. L. REV. 33 (2003) 14

Victor E. Schwartz & Christopher E. Appel, *Putting the Cart Before the Horse: The Prejudicial Practice of a "Reverse Bifurcation" Approach to Punitive Damages*, 2 CHARLESTON L. REV. 375 (2008) 20

Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform — State Legislatures Can And Should Meet The Challenge Issued By The Supreme Court Of The United States in* Haslip, 42 AM. U.L. REV. 1365 (1993) 14

Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007) 11

U.S. Chamber of Commerce Institute of Legal Reform, *Lawsuit Climate 2008: Ranking the States, available at* http://www.instituteforlegalreform.com/issues/tools/ppt/LawsuitAbuseFactFacts2008.ppt. 19

Verdict Search, *Top Verdicts of 2007, available at* http://www.verdictsearch.com/index.jsp?do=top100 19

Malcolm Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation,* 40 ALA. L. REV. 919 (1989) 6

Stephen C. Yeazell, *Punitive Damages, Descriptive Statistics, and the Economy of Civil Litigation,* 79 NOTRE DAME L. REV. 2025 (2004) 17

INTEREST OF *AMICI CURIAE*[1]

Amici curiae represent businesses and other entities that often find themselves targeted in civil actions seeking punitive damages. For this reason, *amici* have a substantial interest in ensuring that punitive damages are not excessive and awarded according to procedures that comport with due process. As explained below, we believe these principles were violated in the subject cases.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before this Court that have addressed punitive damages issues.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. The U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber

---

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

With a 5000 member reach, the West Virginia Chamber of Commerce ("Chamber") is the recognized as the voice of business in West Virginia. In that role, it strives to encourage public policies that foster the relocation of new businesses to and the expansion of existing businesses within the state, so that all West Virginians enjoy the benefits of a robust economy. In furtherance of this goal, the Chamber has been a consistent advocate for a legal system that is predictable in its outcomes and functions within the mainstream of established jurisprudence so as to ensure that businesses in West Virginia can and do operate under the same general ground rules as their competitors elsewhere in the country.

The American Gas Association ("AGA") is the national trade association representing energy members that deliver natural gas. The AGA represents over 200 distribution companies, located in all 50 states that deliver natural gas to 64 million customers throughout the United States. AGA members include: (1) publicly traded energy utilities, municipally owned energy utilities, and privately held utility companies and (2) natural gas distributors, pipelines, marketers and storage facilities. AGA is an advocate for local natural gas utility companies and provides a broad range of programs and services for members including the

filing of *amici* briefs commenting on issues that could affect its members and/or their customers.

STATEMENT OF THE CASE

Amici adopt Petitioners' statements of the cases.

SUMMARY OF ARGUMENT

The punitive damages awards in these actions – a $270 million punitive award that is the largest in the history of West Virginia and a $100 million punitive award that was the third largest upheld by West Virginia courts in 2007 – present recurring issues that merit this Court's attention.

First, the Petitions illustrate the difficulty some courts have had in applying the three "guideposts" this Court set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), to help provide potential defendants with "fair notice . . . of the conduct that will subject [them] to punishment [and] the severity of the penalty that a State may impose." *Id.* at 574. These Petitions present the Court with an opportunity to (1) provide needed guidance and objectivity to *Gore*'s "reprehensibility" guidepost; (2) address confusion that has arisen with respect to the application of *Gore*'s "ratio" guidepost by (a) making clear that the excessiveness inquiry must begin with an examination of whether the actual dollar amount of the award exceeds the State's legitimate interests in punishment and deterrence, and (b) squarely hold that a 1:1 ratio must provide the "fair upper limit," *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2633 (2008), in cases like these that involve very large compensatory damages and questionable reprehensibility; and (3) clarify the function of the third *Gore* guidepost relating to civil

or criminal penalties that could be imposed for comparable conduct.

Second, these Petitions present the Court with an opportunity to clarify that due process requires at least one meaningful review of a punitive damages award by an appellate court. West Virginia is the only state that denies defendants that right in cases involving substantial punishment.

ARGUMENT

I. THE BACKGROUND IN WHICH THESE PETITIONS SHOULD BE CONSIDERED

For most of this nation's history, punitive damages "merited scant attention," because they "were rarely assessed and likely to be small in amount." D. Dorsey Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. REV. 1, 2 (1982). Punitive damages, sometimes called exemplary damages, were traditionally reserved for a narrow category of torts involving conscious and intentional harm inflicted by one person on another, such as assault and battery, false imprisonment, and trespass. *See* James B. Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on The Citadel*, 14 ST. MARY'S L.J. 351, 355 (1983); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984). Typically, punitive damages awards only slightly exceeded compensatory damages awards, if at all. *See* Victor E. Schwartz et al., *Reining In Punitive Damages "Run Wild": Proposals for Reform By Courts And Legislatures*, 65 BROOK. L. REV. 1003, 1008 (2000).

Beginning in the late 1960s, however, courts began to allow punitive damages in cases that did not involve intentional misconduct, such as in product liability actions. *See Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689 (1967) (holding for the first time that punitive damages were recoverable in a strict product liability action). The "perfect storm" created by the coupling of this dramatic expansion in the law with the advent of "mass torts" began to impact the frequency and size of punitive awards.

For example, until 1976, there were *only three* reported appellate court decisions upholding awards of punitive damages in product liability cases, and in each case the awards were relatively modest. *See Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976) ($125,000 compensatory, $100,000 punitive); *Toole, supra* ($175,000 compensatory, $250,000 punitive); *Moore v. Jewel Tea Co.*, 253 N.E.2d 636 (Ill. App. 1969) ($920,000 compensatory, $10,000 punitive), *aff'd*, 263 N.E.2d 103 (Ill. 1970). Then, in the late 1970s and 1980s, the size of punitive damages awards "increased dramatically," George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123 (1982), and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface." John Calvin Jeffries, Jr., *A Comment on The Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986); E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Efficiently*, 40 ALA. L. REV. 1053, 1061 (1989) (noting a "general trend toward awarding punitive damages more frequently and in larger amounts in recent years."). One commentator observed, "Today, hardly a month goes by without a

multi-million dollar punitive damages verdict in a product liability case." Malcolm Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation*, 40 ALA. L. REV. 919 (1989).

A similar expansion in the availability of punitive damages occurred in breach of contract cases. As Justice O'Connor observed in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 62 (1991) (O'Connor, J., dissenting):

> For over 200 years, recovery for breach of contact has been limited to compensatory damages. In recent years, however, a growing number of States have permitted recovery of punitive damages where a contract is breached or repudiated in bad faith. *See, e.g., Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, [686 P.2d 1158 (Cal. 1984)]. *Unheard of only 30 years ago, bad faith contract actions now account for a substantial percentage of all punitive damages awards.* (Emphasis added).

By 1991, this Court expressed concern that punitive damages had "run wild." *Haslip*, 499 U.S. 1, 18 (1991); *see also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) ("Recently, . . . the frequency and size of such awards have been skyrocketing" and "it appears that the upward trajectory continues unabated."). Between 1996 and 2001, the annual number of punitive damages awards exceeding $100 million doubled. *See* John Y. Gotanda, *Punitive Damages: A*

Comparative Analysis, 42 COLUM. J. TRANSN'L L. 391, 392 (2004).

Against this backdrop, the Court has established specific measures to guard against arbitrary and excessive punishment, recognizing that the Due Process Clause of the Fourteenth Amendment imposes both substantive and procedural safeguards in punitive damages cases. *See Haslip* (1991), *TXO* (1993); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *Gore* (1996); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2002); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

In its decisions, the Court has observed that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," *Oberg*, 512 U.S. at 432; *Campbell*, 538 U.S. at 417, because "defendants subjected to punitive damages in civil cases have not been accorded the protections available in a criminal proceeding." *Campbell*, 538 U.S. at 417. The Court also has recognized that punitive damages, like many forms of punishment, are by their nature, designed to "engender adverse social consequences," *Addington v. Texas*, 441 U.S. 418, 426 (1979), and may have "potentially devastating" ramifications for a defendant's character, reputation, business, and good will. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan and Marshall, J.J., concurring).[2] Most recently, in

---

[2] *See also International Bhd. Of Elec. Workers v. Foust*, 442 U.S. 42, 50 (1979) ("the impact of [a punitive damages award] is unpredictable and potentially substantial"); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 417 (1967) (puni-

Baker (2008), the Court indicated that "runaway" punitive awards may not be "mass-produced," *id.* at 2624, but "the spread is great" and punishment continues to be imposed arbitrarily in outlier cases. 128 S. Ct. at 2625.

The subject Petitions address important punitive damages issues that merit this Court's attention. Section II of this brief discusses the need for this Court to provide additional guidance with respect to the three "guideposts" this Court set forth in *Gore*. Section III discusses the need for this Court to clarify the right of civil defendants to obtain appellate review of punitive damages awards.

II. THIS COURT SHOULD GRANT CERTIORARI TO GIVE ADDITIONAL GUIDANCE ON THE *GORE* GUIDEPOSTS

This Court in *Haslip* (1991) acknowledged for the first time that excessive punitive damages awards could violate the Fourteenth Amendment. 499 U.S. at 18. The Court upheld the award at issue, but said that a 4-1 ratio between punitive and compensatory damages "may be close to the line" of "constitutional impropriety." *Id.* at 23-24. In *TXO* (1993), a plurality of the Court said that "the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'" 509 U.S. at 454. The Court found that those limits had not been reached in *TXO*, but chose to note once again the *Haslip* Court's observation that a 4-1 ratio "may be close to the line of constitutional permissibility." *Id.* at 459. In *Oberg* (1994), the Court departed from

---

tive damages awards have "'momentous and serious' . . . consequences" for civil defendants) (citation omitted).

substantive due process questions, but affirmed "that the Constitution imposes a substantive limit on the size of punitive damages awards." 512 U.S. at 420.

Finally, in *Gore* (1996), the Court struck down an excessive punitive award for the first time. The Court stated: "*Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.*" 517 U.S. at 574 (emphasis added). The Court then provided three "guideposts" for States to follow: (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio of punitive damages to the actual (or potential) harm to the plaintiff, and (3) the civil or criminal penalties that could be imposed for comparable misconduct. *See id.* at 575.

Justice Breyer observed for three concurring justices: "Requiring the application of law, rather than a decision-maker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to *assure* the *uniform general treatment* of similarly situated persons that is the essence of the law itself." *Id.* at 587 (Breyer, J., concurring) (emphasis added).

In *Cooper* (2002), 532 U.S. at 400, and *Campbell* (2003), 538 U.S. at 418, the Court reiterated the importance of the *Gore* guideposts. In *Campbell*, as in *Gore*, the Court struck down an excessive punitive award as violating due process.

Amici applaud the Court's leadership in helping to restore some order and fairness in punitive damages cases. The goals of "fair notice" and "uniform

general treatment" that *Gore* sought to provide have been undermined, however, by a lack of clarity as to how the three factors are to be applied. The subject Petitions provide outstanding opportunities for this Court to improve the implementation of the *Gore* guideposts.

1. "Reprehensibility" in Contract Disputes

Gore instructs courts to consider the "degree of reprehensibility of the defendant's conduct" in reasonableness determinations. 517 U.S. at 575.

As explained, a growing number of punitive damages awards arise out of contractual disputes and other alleged financial injuries. *See also* Erik K. Moller et al., *Punitive Damages in Financial Injury Verdicts*, 28 J. LEGAL STUD. 283, 284 (1999) ("[C]ases in which the injuries suffered by the plaintiff are financial in nature receive punitive damages awards much more frequently than cases in which the injuries suffered by the plaintiff are personal in nature."); Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 28 (1998) ("Punitive damages play an increasingly prominent role in business . . . cases."); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 757 (2002) ("punitive damages tend to be awarded more frequently in financial injury cases."). As one commentator has summarized:

> According to RAND, in recent years 22.5% of all plaintiff verdicts (14.2% of all verdicts) have resulted in punitive damages in cases involving financial injury. *Financial torts have dominated the mar-*

> *ket for punitive damages in recent years.* According to RAND, financial torts, which made up 13% of all tort cases in America, have produced 50% of all punitive-damages verdicts. One can measure the degree to which punitive damages have dominated financial torts in other ways too: Sixty cents out of every dollar awarded in a financial-tort verdict have been for punitive damages, a far higher amount than any other tort. In fact, according to the Department of Justice study, 64% of all dollars awarded for punitive damages in 1992 were awarded in cases involving financial injury.

Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 968 (2007) (internal citations omitted) (emphasis added). This trend is especially problematic in contractual disputes, where defendants generally do not have "fair notice" that their conduct may give rise to any punishment at all, particularly when the defendant's interpretation of the contract is objectively reasonable.

This Court should remind reviewing courts that the purpose of the "reprehensibility" factor is to determine whether the conduct "was *especially* or *unusually* reprehensible enough to warrant" the amount of punishment imposed." *Id.* at 590 (Breyer, J., concurring) (emphasis in original). In most contractual disputes, this analysis should support only a modest award, if any at all. *See Safeco Inc. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2215 (2007) (actions based upon an objectively reasonable interpretation of a statute are neither willful nor reckless); *see also*

A. Mitchell Polinsky, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 939 (1998) (concluding that "courts should be cautious about awarding punitive damages for breach of contract.").

2. "Ratio" – Courts Should Be Reminded to Weigh Reasonableness *And* Proportionality

The second *Gore* factor focuses on the ratio of punitive to compensatory damages. The Petitions raise two related issues with respect to the application of this guidepost.

First, too many courts have lost sight of the forest for the trees. They have become so focused on applying mathematical ratios that they have forgotten that the "ratio" guidepost is intended to prevent excessive awards, not justify them. Petitioner Massey Energy's case is a textbook example.

Before courts launch into considering the ratio between punitive and compensatory awards in a particular case, they need to be admonished to take a step back and ask, "Does this award go beyond the State's interests in punishment and deterrence?" *See Gore*, 517 U.S. at 568. If the award exceeds the amount supported by those interests, either in actual dollar terms *or* by reference to a ratio, then the award must be declared unconstitutional.

Indeed, in *Campbell*, this Court said that "courts must ensure that the measure of punishment is *both reasonable and proportionate* to the amount of harm to the plaintiff and to the general damages recovered." 538 U.S. 426. Plainly, courts need to be reminded to consider both reasonableness and proportionality; they cannot rubber stamp large awards

simply because the ratio, standing alone, does not appear offensive.

Second, clearer guidance is needed with respect to the acceptable ratio to be applied in cases such as these involving very substantial compensatory awards. In *Campbell* (2003), the Court said that, "*in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process*," repeated its *Haslip, TXO, and Gore* statements that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety," and also referred to "a long legislative history . . . providing for sanctions for double, treble, or quadruple damages to deter and punish." 538 U.S. at 425 (emphasis added). The Court also explained, "*When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.*" *Id.* (emphasis added).

Most recently, in *Baker* (2008), the Court, sitting as a common law court, explained that the "real problem" with punitive damages is their "stark unpredictability," 128 S. Ct. at 2625, emphasized that "*a penalty should be reasonably predictable in its severity*," *id.* at 2627, and concluded that "*as long 'as there are no punitive-damages guidelines, corresponding to the federal and state sentencing guidelines, it is inevitable that the specific amount of punitive damages awarded . . . will be arbitrary.*" *Id.* at 2629 (emphasis added; citation omitted). The Court then settled on a 1:1 ratio of punitive damages to compensatory damages as a "fair upper limit" in maritime cases. *Id.* at 2633.

This Court should squarely hold that a 1:1 ratio provides the "fair upper limit" in cases like these that involve very large compensatory damages and questionable reprehensibility.

3. Courts Need to be Reminded That They Must Consider Civil or Criminal Penalties For Comparable Conduct

In a pre-*Gore* law review article and *amicus curiae* briefs to the Court, these authors suggested that punitive damages should be considered in light of criminal fines for similar conduct.[3] The third *Gore* factor instructs courts to consider the "civil or criminal penalties that could be imposed for comparable misconduct."

Unfortunately, lower courts have struggled in their attempts to apply the third *Gore* factor. Some courts have faithfully applied all three of the Court's guideposts, but "many courts have selectively applied the criteria in ways that run counter to the letter and spirit of the Court's jurisprudence." Victor E. Schwartz et al., *Selective Due Process: The United States Supreme Court Has Said That Punitive Damages Awards Must Be Reviewed for Excessiveness, But Many Courts Are Failing to Follow The Letter And Spirit of The Law*, 82 OR. L. REV. 33, -- (2003).

In particular, many courts are ignoring, giving "short shrift" to, or misapplying the third *Gore* factor. *See id.*; *see also* Brief of General Dynamics Corp. as

---

[3] *See, e.g.*, Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform — State Legislatures Can And Should Meet The Challenge Issued By The Supreme Court Of The United States in* Haslip, 42 AM. U.L. REV. 1365, 1380 n.87, 1386-1391 (1993).

Amicus Curiae in Support of Petitioner, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, No. 99-2035, at 3, *available at* 2000 WL 1793074 (explaining how the "vast majority of appellate courts have ignored or misapplied [*Gore's*] third Guidepost); Mark A. Klugheit, "*Where the Rubber Meets the Road*": *Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation*. 52 SYRACUSE L. REV. 803, 834 (2002) ("The Third *BMW* factor -- existing sanctions for comparable misconduct -- seems to have been honored by lower courts as much in the breach as in the observance."). "Some have erroneously interpreted the Court's discussion of the third guidepost to preclude any comparison of punitive damages awards with criminal penalties on the ground that civil proceedings lack the protections afforded in criminal prosecutions." Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze From the BMW/State Farm Guideposts*, 37 U. MICH. J.L. REFORM 441, 443 (2004).

Courts must be reminded to faithfully apply *Gore* "factor three."

III. THIS COURT SHOULD GRANT CERTIORARI TO REQUIRE APPELLATE REVIEW OF PUNITIVE DAMAGES AWARDS

This Court has repeatedly emphasized the importance of appellate review as a critical check against arbitrary, excessive, and unpredictable punitive damages awards. *See Williams*, 127 S. Ct. at 1063-64; *Campbell*, 538 U.S. at 418; *Cooper Industries*, 532 U.S. at 426; *Oberg*, 512 U.S. at 420; *Haslip*, 499 U.S. at 20. That safeguard is discretionary and often nonexistent in West Virginia, as the subject Petitions

illustrate. West Virginia is the only state in which there is no right to appellate review of a punitive damages award exceeding $350,000, even if the award is completely lawless.

As we explain below, West Virginia's system (1) violates this Court's due process holdings, (2) is far outside the legal mainstream, and (3) creates a substantial risk that civil defendants will either face excessive punishment in West Virginia or be forced to turn to this Court to uphold due process limits in many instances. This Court should grant certiorari and hold that due process requires at least one meaningful review of a punitive damages award by an appellate court.

In *Haslip*, where this Court upheld a punitive award as consistent with due process, the Court stressed the availability of both "meaningful and adequate review by the trial court" and subsequent appellate review. 499 U.S. at 20. The Court explained, "By its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion," and said that "[t]his appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose." 499 U.S. at 20-21. In *TXO*, the plurality found that the fact that the award was unanimously affirmed on appeal gave rise to a "strong presumption of validity." 509 U.S. at 457.

In subsequent cases the Court again emphasized the importance of appellate review to the due process analysis. In *Oberg*, the Court explained that "[j]udicial review of the size of punitive damages has been a safeguard against excessive verdicts for as

long as punitive damages have been awarded." 512 U.S. at 421. The Court held that Oregon's denial of judicial review of the size of punitive damages awards violated due process. *See id.* at 432. *Oberg* has been interpreted to stand for the proposition that "appellate review of punitive damage awards [is] required." Stephen C. Yeazell, *Punitive Damages, Descriptive Statistics, and the Economy of Civil Litigation*, 79 NOTRE DAME L. REV. 2025, 2027 (2004).

In *Cooper*, the Court held that federal appellate court review of punitive damages must be *de novo*. 532 U.S. at 443; *see also* Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1069-70 (2004) ("state appellate courts, too, must exercise de novo review over whether punitive damages are excessive.").

More recently, this Court confirmed that "[e]xacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." *State Farm*, 538 U.S. at 418 (citation omitted). If appellate review of punitive damages must be *de novo* and "[e]xacting," then certainly due process is violated when a state completely denies a defendant of any right to appellate review of a substantial punitive award.

The *Oberg* Court's due process methodology provides additional support for holding that West Virginia's system violates due process. In *Oberg*, the Court looked to modern and traditional procedures as a benchmark. 512 U.S. at 426, 435.

The modern practice in forty-eight states, the District of Columbia, and the federal court system, is to

give punitive damages defendants at least one appeal as of right. West Virginia and its "mother state," Virginia, are the only two states that do not afford such a right. Virginia, however, protects against substantial punishment by capping punitive damages at $350,000, *see* VA. CODE § 8.01-38.1, and the Virginia Supreme Court considers the refusal of a petition for appeal to be "a decision on the merits." *Sheets v. Castle*, 559 S.E.2d 616, 619 (Va. 2002). West Virginia, therefore, is the only state which denies a right to appellate review on the merits to defendants facing a substantial punitive damages judgment. Moreover, as Petitioners explain, the right to appellate review finds additional support in the common law. *See, e.g., Oberg*, 512 U.S. at 421.[4]

The need for appellate review in West Virginia is heightened by the State's notorious reputation for treating civil defendants unfairly, particular large out-of-state corporations. West Virginia has the dubious distinction of being named the only statewide "Judicial Hellhole" by ATRA for several years running.[5] A recent survey of in-house legal counsel conducted by the U.S. Chamber of Commerce's Institute

---

[4] This Court has said in *dicta* that states are not constitutionally required to provide appellate review of criminal convictions. *See, e.g., Jones v. Barnes*, 463 U.S. 745, 751 (1983). *Amici* agree with Petitioners that those statements should not prevent appellate review of punitive damages awards as a matter of right. There is a historical distinction to be drawn. In addition, criminal defendants have the benefit of substantial additional safeguards, including a higher burden of proof, maximum sentences, and federal habeas corpus.

[5] *See* American Tort Reform Foundation, *Judicial Hellholes* 11-14 (2007), http://www.atra.org/reports/hellholes/report.pdf.

for Legal Reform ranked West Virginia as having the nation's worst legal climate.[6]

In 2007, West Virginia was home to three of the seven largest punitive awards in the nation, including the two subject Petitions with punitive damages together approaching *$400 million*.[7] In the third case, which involves nearly $200 million in punitive damages, West Virginia's Governor has taken the extraordinary step of asking the West Virginia Supreme Court of Appeals to provide meaningful review of punitive damages awards. *See Amicus Curiae* Br. of Joe Manchin, III, Governor of the State of West Virginia, *E.I. du Pont de Nemours & Co. v. Perrine*, No. 080721 (W.Va. June 24, 2008). Together, these three verdicts – totaling *over a half a billion dollars in punitive damages* - demonstrate the high risk in West Virginia that an excessive verdict resulting from a lack of procedural safeguards may face absolutely no appellate scrutiny unless this Court holds that such review is required.

The practice of West Virginia trial courts to order reverse bifurcation of punitive damages trials – which the West Virginia courts view as "creative, innovative" trial management, *see In re Tobacco Litig.*, 624 S.E.2d 738, 739 n.1 (W. Va. 2005) – adds to the likelihood that civil defendants will be subject to arbitrary and excessive punishment in the State. *See*

---

[6] *See* U.S. Chamber of Commerce Institute of Legal Reform, *Lawsuit Climate 2008: Ranking the States*, http://www.instituteforlegalreform.com/issues/tools/ppt/LawsuitAbuseFactFacts2008.ppt.

[7] *See* Verdict Search, *Top Verdicts of 2007*, http://www.verdictsearch.com/index.jsp?do=top100.

Victor E. Schwartz & Christopher E. Appel, *Putting the Cart Before the Horse: The Prejudicial Practice of a "Reverse Bifurcation" Approach to Punitive Damages*, 2 CHARLESTON L. REV. 375 (2008).

This Court should clarify that due process requires affording punitive damages defendants a right to at least one meaningful appellate review. If this Court fails to do so, civil defendants in West Virginia punitive damages cases will have no choice other than to continue to turn to this Court for relief.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant the subject Petitions for Writs of Certiorari.

Respectfully submitted,

Victor E. Schwartz
Mark A. Behrens
(Counsel of Record)
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
600 14th Street, N.W., Suite 800
Washington, D.C. 20005
(202) 783-8400
Counsel for Amici Curiae

H. Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW
Suite 400
Washington, D.C. 20036
(202) 682-1163

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Brenda Nichols Harper
WEST VIRGINIA CHAMBER OF COMMERCE
1624 Kanawha Boulevard East
Charleston, WV 25311
(304) 342-1115

Kevin B. Belford
AMERICAN GAS ASSOCIATION
400 N. Capitol St., NW, Suite 450
Washington, DC 20001
(202) 824-7070

Of Counsel

Dated: September 22, 2008